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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DANNY ALVA et al., Plaintiffs and Appellants, v. DOUGLAS MARTIN, a Law Corporation, Defendant and Respondent.	B212327 (Los Angeles County Super. Ct. No. GC038591)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Jan A. Pluim, Judge. Reversed.

Gibson Rivera & Toms and Clark Rivera for Plaintiffs and Appellants.

Law Offices of Lacey, Dunn & Do and Kevin S. Lacey for Defendant and Respondent.

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INTRODUCTION

In this action for breach of contract, legal malpractice and dual representation of adverse interests, plaintiffs Danny Alva (Alva) and Cecilia Alva (collectively the Alvas) appeal from the judgment entered against them after the trial court granted the motion for summary judgment filed by defendant Douglas Martin, a law corporation (Martin[1]). The Alvas also appeal from the post-judgment order awarding costs. We reverse the judgment and the order.

FACTS

A. *Commencement of Bellini Franchise[2] in Old Town Pasadena*

In 1996, Richard Dennis (Dennis) and Anne Dennis (collectively the Dennises), through their corporate entity, Dream a Little Dream, Incorporated (DLD), commenced operation of a Bellini franchise in the Old Town section of Pasadena. DLD leased the commercial premises from which the business operated, namely 165 S. Fair Oaks Avenue, along with a warehouse at 25 ½ West Valley Street in Pasadena, from Burton A. Burton and the Marilyn V. Burton Trust (landlord or Marilyn Burton). Both buildings were leased for a five-year period commencing in August 1996. The lease signed by the Dennises and the landlord was a form American Industrial Real Estate Association lease entitled, "STANDARD INDUSTRIAL/COMMERCIAL SINGLE-TENANT LEASE-NET."

Paragraph 13 of the addendum to the lease agreement provided: "At the termination of this Lease, Lessee shall have the option to renew for a 5 year period, and at the end of that period, an option to renew for another like period. (Option Term) At

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1 Hereinafter "Martin" will refer to defendant law corporation and Attorney Douglas Martin.

2 Bellini is a high-end retailer of furniture and accessories for infants and children.

start of each Option Term, rent shall be adjusted such that the initial rent for the Option Term shall be equal to initial rent for this Lease adjusted by the percentage change in the Consumer Price Index, all items, Greater Los Angeles Metropolitan Area, between the Commencement of this Lease and the Commencement of the Option Term. During each Option Term, the rent shall be increased by $200.00 per month on each anniversary of the commencement of that Option Term." The Dennises exercised the first of these options, thereby extending their lease an additional five years to August 31, 2006.

B. ***Alva Enters Negotiations with Dennis to Acquire The Bellini Franchise***

Alva's eldest son, Michael, worked at the Bellini Store. Late in 2005, Michael told his father that Dennis wanted to sell the franchise to settle his divorce. Michael thought it would be a good investment, explaining that the business had suffered over the years due to the Dennises' marital problems. Michael proposed a partnership with his father. Alva would buy the business. Michael, in turn, would manage the store and return it to its former glory. At some point after Alva recouped his investment and made a profit, he would transfer the business to Michael.

In an effort to set up Michael in business, Alva called Dennis to discuss the possibility of purchasing the business. During a total of five meetings, Alva and Dennis, who shared good rapport and who were not represented by counsel, discussed the particulars of the transaction. By the fifth meeting, they had negotiated the principal terms of the deal, including the purchase price.

During their meetings, the men discussed the terms of DLD's lease, which Alva wished to take over. Dennis told Alva that the lease provided for two 5-year options, one of which Dennis already had exercised on behalf of DLD. Dennis was not going to exercise the second option, but Alva intended to do so. The remaining lease term, the prospect of the five-year option, and lease rate were of particular interest to Alva. Alva told Dennis it was important that Alva be able to take over the lease for the remaining five and one-half year period at the favorable lease rate that Dennis had. As far as Alva was concerned, this was critical to the success of the deal.

Alva asked for a copy of the lease he proposed to assume. Upon receipt of the lease from Dennis in late December 2005 or early January 2006, Alva "briefly glanced over the dates" of the lease and read the provision providing for two 5-year options. Alva did not read the lease in its entirety, however.

On January 13, 2006, Dennis composed a letter, which he described as "a very rough draft" of the verbal agreement reached with Alva. It was intended to be reviewed and initialed by all and included an invitation to suggest changes. Dennis further explained, "This is not meant to be a legal document but rather a working paper to list all the high points of the agreement at which time we will have an attorney put things into proper form. Expenses for any common work that needs to be done to finalize the agreement are to be shared equally. Any expenses in the start up of the business or for either party to have things reviewed for their benefit are at the expense of that person." Alva understood that the attorney hired would represent him and Dennis and that Alva would pay for half the legal fees. Alva did not think there was any reason to have an attorney review things for his own benefit since the attorney they hired would "represent both of us and look after . . . both of our benefits."

Among other things, the "working paper" specified that the sale price was $200,000, plus $2,000 per month for 12 months, for a total of $240,000. The $200,000 was to be paid to DLD on February 7, 2006. The monthly payments were to be made to Dennis by the 10th of every month or the first business day thereafter. The value of the inventory was to be agreed upon with cost being determined by actual count and audit of invoices. If the inventory was valued at less than $85,000, the difference would be deducted from the $200,000 payment. If the value of the inventory exceeded $100,000, the amount over $100,000 would be paid to DLD in two equal payments on the first of March and April 2006. The actual transfer of ownership was slated to take place on February 1, 2006, with all liabilities and debts incurred from that date to be the Alvas' responsibility. The liabilities and debts incurred included "rent, utility costs, inventory purchases or payroll or tax costs." The sale was to include "all franchise rights, computer programs and hardware currently on site" but not personal belongings. Although the

parties had not discussed the subject of a deposit, Dennis asked for $20,00 deposit due when "we sign this 'letter of understanding.'"

On January 19, 2006, Dennis sent Alva an email responding favorably to modifications requested by Alva, as well as providing clarification. With regard to the request for a deposit, Dennis wrote, "The $20 K would be returned unless you decided you just no longer wanted to buy the store. Could not transfer sales/rent/etc. without something." On January 20, the Alvas and the Dennises signed both the January 13 "working paper" and the January 19 email.

C. *Dennis Contacts Martin to Inquire About Representation*

At this juncture, Dennis recommended Martin as an attorney who might be able to help the parties complete the transaction. Martin previously had represented the Dennises, counseling them in connection with their acquisition of the Bellini franchise and the incorporation of DLD. Alva accepted Dennis's recommendation, and the two men agreed to share equally the legal costs of documenting and completing their proposed transaction. Due to his prior relationship with Martin, Dennis was appointed the primary contact for all dealings with Martin. At that time, Alva had no concern that Martin previously had represented Dennis.

On January 30, 2006, Dennis telephoned Martin and conveyed to him the nuts and bolts of the transaction, including the desire for joint representation. Later that same day, Dennis faxed the following letter to Martin:

"Doug,

"Based on our conversation from this morning I am sending along all that we have put into writing so far with regards to the sale of the business. This has been a very amicable and trusting process and our mutual goal is to make sure that we are not leaving any loopholes or pitfalls that would pose a liability for <u>either</u> party.

"The intent is to sell all the assets of the business from Rick and Anne Dennis to Danny and Cecilia Alva. There is to be no old debt carried forward and Anne and Rick warrant that there are no liens or debts on the inventory being transferred.

"From February 1, 2006 forward all debts will be the responsibility of the Alva's [*sic*]. This would include inventory, taxes, payroll etc. There will also be the chance that for the month of February the lease will still be in the name of the Dennis' [*sic*] and the Alva's [*sic*] will sublease out. They will be responsible for any building debts or damage.

"We also need to include a 'promise not to compete' clause.

"We have pushed this very quickly and realize that we are imposing on you a bit in terms of time, but we are anxious to get this done quickly. As in yesterday. We appreciate anything you can do to help us move things along. We also appreciate the symmetry of your being the one to help finalize the sale. It just seems appropriate."

Accompanying the January 30, 2006 letter faxed to Martin were the January 13, 2006 "working paper" signed by the Dennises and the Alvas, Dennis's email of January 19, 2006 signed by the Dennises and the Alvas, a draft sales agreement prepared by Dennis, and a draft assignment agreement intended to assign and transfer DLD's right, title and interest in the Bellini franchise agreement it entered into in November 2004 to the new transferees, namely plaintiffs.

The draft sales agreement pertained to the sale of goods from defendants to plaintiffs. The term "Goods" was defined as "The Bellini Store at 165 S. Fair Oaks Ave., Pasadena, CA 91105 including all franchise rights, inventory, fixtures, equiptment [*sic*] and supplies." The draft agreement further provided that the goods would be delivered on or before February 1, 2006 at the store on 165 S. Fair Oaks Avenue and at the warehouse on 25½ West Valley Street in Pasadena and that the "buyer is responsible for all shipments and liabilities from February 1, 2006 forward." This was to include "rent, payroll, all taxes and insurance and customer liabilities."

D. *The Dennises and the Alvas Retain Martin*

On January 31, 2006, Martin faxed a letter to the Dennises and the Alvas, along with an engagement letter and a conflict of interest letter. In his cover letter, Martin explained that "in order for me to advise all of you in the purchase and sale of Bellini,

Pasadena, it is necessary for me to first obtain a Waiver of Conflict Agreement signed by all of you," as well as a signed engagement letter.

The parameters of Martin's legal representation were set forth in the engagement letter as follows:

"1. LEGAL SERVICES TO BE PROVIDED. The legal services provided or to be provided by our firm on your behalf have been, or will cover, the following:

"a. Review of documents provided by the Dennises and the Alvas in reference to the purchase and sale of Bellini, Pasadena;

"b. Advice to all parties in connection therewith;

"c. If requested by any such party, preparation of related documents; and

"d. Telephone conversations, correspondence, and related meetings in reference to the above."

"By signing this letter agreement you are reducing to writing the hiring of this firm to provide the legal services referred to above.

"2. LEGAL SERVICES SPECIFICALLY EXCLUDED, Legal services that are not to be provided by me under this agreement specifically include, but are not limited to, the following: rendering of advice regarding investments or financial planning; and any activity related to litigation.

"If you wish that we provide any legal services not called for under this agreement, a separate written agreement between you and our firm will be required."

The Dennises and the Alvas retained Martin by signing the engagement letter agreement around February 7, 2006. They also signed the conflict of interest waiver, which was addressed to Martin and stated: "This is to confirm that [the Dennises], which in the past you have represented in connection with Bellini, Pasadena, and [the Alvas], each, hereby waive any conflict of interest that might otherwise exist now or in the future, due to your representation of the Dennises and Alvas on the sale by the Dennises to the Alvas of the assets of the store referred to as 'Bellini, Pasadena.'" Specific instances of potential conflict were not spelled out in the waiver.

Alva already had taken possession of the store by that time. Somewhere between February 1 and 7, 2006, Alva paid Dennis $100,000. Alva paid the remaining $100,000 balance toward the end of February.

E. ***Martin Renders Legal Services***

On February 9, 2006, Martin faxed Dennis and Alva a letter with enclosures, consisting of a copy of their proposed sales agreement which Martin "marked up" (i.e., edited and revised by hand), a proposed bill of sale and a copy of California's Bulk Sales Law. In his letter, Martin informed Dennis and Alva that he "set forth the $24,000.00 payment as a consulting fee rather than making such payment part of the sales price or the subject of a promissory note." Martin also advised that California Bulk Sales Law might apply to their transaction. After setting forth some of the requirements of the law and noting that the parties did not want to delay the transaction to comply with the law, Martin noted that he "added to the enclosed Agreement a provision regarding non-compliance with the California Bulk Sales law."

Martin further noted he understood that "we are not to be concerned with a Covenant Not To Compete, a Financing Statement, a Security Agreement, approval of the Franchisor, or the income tax treatment of the subject transaction to either the Seller or Purchaser." Martin advised that the board of directors and shareholders of DLD would have to approve the sale of the franchise to the Alvas. Finally, Martin communicated his understanding that Dennis and Alva would "cause the final version of the Sales Agreement to be retyped," and he asked them to provide him with a copy of all executed documents.

F. ***The Dennises and Alvas Execute the Sale Agreement***

Sometime after receiving Martin's February 9, 2006 correspondence and enclosures, Dennis typed the final version of the sales agreement. A comparison of the version edited and revised by Martin with the final version executed by the Dennises and the Alvas, readily reveals that Dennis did not include all of Martin's suggested revisions.

Dennis also added a covenant not to compete, as well as the following paragraph: "The Seller assigns the lease of the premises to the Purchaser along with all rights and obligations of the lease. Purchaser is to pay rent directly to the Landlord of record and perform all duties associated with the lease. Payment of rent, taxes and all required maintenance and insurance requirements are the responsibility of the Purchaser." Although the final sales agreement and bill of sale purport to have been executed on February 1, 2006, they were not prepared and executed until sometime later. Thus, it appears, the Dennises and the Alvas backdated these documents.

G. *Dennis Obtains the Consent of the Landlord to Assign Lease.*

On February 13, 2006, in accordance with paragraph 12 of their lease agreement entitled "Assignment and Subletting," the Dennises wrote to Marilyn Burton and informed her that DLD intended to sell 100 percent of the assets of its "Bellini business at 165 S. Fair Oaks Ave. and 25½ Valley Blvd., Pasadena, CA 91105" to the Alvas. The same day, John Koslov (Koslov), counsel for the landlord, faxed a letter to the Dennises. It stated: "Yours of even date to Marilyn Burton has come to my attention. I have discussed this to some extent with Glenn Leisure[(Leisure), the landlord's property manager]. [¶] Since your lease still has a while to run, and since you have personally guaranteed the lease, it is important, I think, to discuss your intentions with respect thereto. I suppose that you intend to assign or sub-lease, but your letter did not make that clear. [¶] I don't think Marilyn has any objection to an assignment, but it's probably best to send me a copy, just to be sure. We do not require any particular wording in an assignment, other than identification (including home addresses, phone numbers and social security numbers) of the assignee. I have what appears to be satisfactory economic data on the proposed assignee. The remaining assignment terms, insofar as they affect our mutual rights and duties, are included in the basic lease. [¶] It's been a pleasure working with you these many years. As you move towards other challenges and other adventures, I wish for you all the best in all things and for all time."

On February 15, 2006, Dennis responded to Koslov's communication and confirmed that it was the Dennises' intention to assign the lease to the Alvas. Koslov responded with a request for a copy of the proposed assignment, noting that it required the landlord's approval to become operative.

H. ***Martin's Billing Statement.***

On March 15, 2006, Martin wrote Dennis and Alva a letter in which he stated: "Since I have not heard from either of you for the past three weeks, I can only assume that your transaction has closed, and there is nothing further at this state called for in regard to our additional legal assistance. Thus, I am enclosing our bill for legal services rendered through February 28, 2006, and costs advanced and posted to date." Once again, Martin asked Dennis and Alva to provide him with a copy of their executed agreement for his files. Martin's billing statement listed the total fees and costs incurred as $2,285.78. After application of a $1,000 retainer, the outstanding balance was $1,285.78.

I. ***Alva Learns His Lease was to Expire on September 1, 2006.***

On August 17, 2006, Koslov informed Alva via letter that the lease pursuant to which he occupied the Fair Oaks property would expire by its own terms on September 1. Koslov further explained that "[a]ny renewal option contained in that lease was unassignable, and was not included in any assignment or sub-lease you may have obtained (paragraph 39 of the lease). [¶] Conditioned on your agreement to be bound to the same general terms as are contained in the expiring lease, Lessor is willing to permit you to continue your occupancy for the time being, and solely at the unfettered discretion of Lessor, while negotiations for a new lease are conducted. Essentially, this would constitute an extension, on a month to month basis, of the existing occupancy under the existing terms until Lessor decides otherwise. However, the rent will increase by $200 per month effective 1 September 2006, and the rent will be due the first day of each

month, rather than the 15th, as you may have been previously lead to believe. Please adjust your payment schedule accordingly."

Paragraph 39 of the underlying lease between DLD and the landlord set forth the provisions pertaining to "Options." [3] Paragraph 39.1 ascribed to the term "option" "the following meaning: (a) the right to extend the term of this Lease or to renew this Lease or to extend or renew any lease that Lessee has on other property of Lessor; (b) the right of first refusal to lease the Premises or the right of first offer to lease the Premises or the right of first refusal to lease other property of Lessor or the right of first offer to lease other property of Lessor; (c) the right to purchase the Premises, or the right of first refusal to purchase the Premises, or the right of first offer to purchase the Premises, or the right to purchase other property of Lessor, or the right of first refusal to purchase other property of Lessor or the right of first offer to purchase other property of Lessor."

Paragraph 39.2, entitled "Options Personal To Original Lessee" states, "Each Option granted to Lessee in this Lease is personal to the original Lessee named in Paragraph 1.1 hereof, and cannot be voluntarily or involuntarily assigned or exercised by any person or entity other than said original Lessee while the original Lessee is in full and actual possession of the Premises and without the intention of thereafter assigning or subletting. The Options, if any, herein granted to Lessee are not assignable, either as a part of an assignment of this Lease or separately or apart therefrom, and no Option may be separated from this Lease in any manner, by reservation or otherwise."

J. *Dennis and Alva Learn That the Lease, but not the Option to Extend the Lease, was Assigned*

After Alva received Koslov's August 17, 2006 letter, Dennis and Koslov exchanged a series of emails regarding the unfortunate circumstances in which the Alvas found themselves. Alva was copied on all emails. In an email dated October 25, 2006,

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[3] Alva was unaware of these provisions when he executed the sales agreement.

Dennis stated his concerns to Koslov as follows: "Some obvious questions and concerns have come up with regard to the Bellini store in the 165 S. Fair Oaks building and I was hoping you might help me out.' [¶] My understanding was that the space was still under lease and that the third and final renewal period had just started in September of this year. Early this year, after discussions with Glenn Leisure and yourself, it was agreed that the preferred method to proceed at the time was to assign the lease and all of it's [*sic*] obligations and benefits to the Alva's. This would give you the protection of Anne and myself still personally guaranteeing the lease while at the same time giving you the opportunity to see how well the Alva's [sic] would manage the store and then proceed forward at a convenient time in the future to craft a new lease with them. Neither Anne nor myself were ever notified that the lease would not be carried forward and were led to believe that paragraph 39.2 of the original lease was waived when the assignment was offered and accepted by you during an option period. This belief was also reflected in the conversations I had with Glenn. Anne and I have also not been notified that the lease was no longer being honored and that we were no longer to be held liable. [¶] I believe that the Alva's [*sic*] have shown complete good faith through this period and have honored the lease completely. In addition they have invested heavily in the business to help take it to the next level. They have done this by installing new flooring in the store, installing new shelves in the warehouse and implementing a new computer system. In addition they have taken out many long term ads in local yellow pages and magazines. All of this was done with the intent of being in place for a very long time. This has been a business that is a mainstay in the area. In the 10 years that the store has been at this location we have seen three different businesses come and go at the 175 [*sic*] building with long periods of time in between when no one was there. We all understand maximizing profit, but stability, loyalty and the certainty of a long term valued tenant must count for something. The potential to increase by approximately $12,000 the amount that Bellini is now paying must certainly be weighed against the concern that that amount would be wiped quickly if a new business was unable to make it in this location. We are all aware of the failure rate of new or relocated businesses. [¶] The intent and belief by all

involved seemed to be that a lease was in place and would be honored and that a quality relationship would continue. I am hoping that would be the case in this situation. [¶] I appreciate in advance your taking the time to review and respond to these concerns."

In response to Dennis's October 25, 2006 email, in which he stated "belie[f] that paragraph 39.2 of the original lease was waived when the assignment was offered and accepted by you during an option period," Koslov responded on October 30 as follows: "Thank you for your-email regarding the lease at 165 S. Fair Oaks. I'm sorry for the concern this matter has caused you, and also particularly sorry for any inconvenience that may fall to the Alvas, who seem like really nice people. [¶] Here is the problem. The lease expired on or about 31 August 2006. There was no lease renewal, and no exercise of any option. Whatever option was provided for by the lease became void when you decided to sublease or assign. There was never any waiver of paragraph 39.2, indeed, there was never any mention of it as between you and me, or between Danny Alva and me. I understand that [Leisure] never discussed the option with you or Danny. If anyone had asked, I would have told them that the option could not be assigned. No one ever asked. I was left to assume that the principals in the proposed assignment transaction read the lease and knew what they were doing." Koslov further stated that only the owners could waive paragraph 39.2 in writing. No one asked them to do so.

Koslov continued, "If there was any agreement that the preferred method was to assign the lease 'and all of its obligations and benefits' to the Alvas neither I nor the Owners were part of that agreement. (Lawyers generally understand the term 'agreement' to indicate a contract, and we're pretty careful how we use it.) Even if there had been such an 'agreement' it would not have created any rights not incident to the original lease, i.e., it would not have revived the mooted option language. The option was not one of the 'obligations and benefits' of the lease, once you decided to assign. [¶] . . . I don't know who may have led you and Anne to believe that paragraph 39.2 of the original lease had been waived. Certainly I never said anything to that effect. If you had asked the answer would have been negative. [Leisure] did not, would not, and could not make such a waiver. In any event, such a waiver would have been an amendment to

the lease and the lease requires that any amendment be in writing, signed by the principals. There is no such writing."

Koslov further noted that he had never seen the written assignment and that he regretted any "misadventure" that befell the Alvas. Koslov informed Dennis that the "owners [were] aware of the risk involved in renting to a new entity" and would "weigh that risk as part of their usual management tasks." The owners also were aware of, and not "insensitive," to the ramifications of the "unfortunate situation" in which the Alvas found themselves.

Finally, Koslov informed Dennis that he had spoken with Alva "since receiving your e-mail, and I think he understands the situation. It's not a happy one for him, and for that I'm sorry. I'm somewhat surprised that you and [Alva] didn't discuss the unassignability of the option. I should have thought that would be a significant part of the pricing structure for the sale of your business."

On October 31, 2006, Dennis wrote back to Koslov and referenced Koslov's February 13, 2006 letter, in which Koslov communicated that Marilyn Burton had no objection to an assignment of DLD's lease to the Alvas. It was for this reason that Dennis "believe[d] that assignment of the option was understood and accepted by all parties involved." Dennis further expressed his belief that based on the manner in which he exercised the first renewal option, "we pursued the [second] renewal in the same manner. That is to say that at no time was written notification required in the past and we handled things in the same manner this time. With no notification provided to myself and with acceptance of rent for the new period I believed that the requirements of the second and final renewal period had been accepted just as it had in the past. [¶] I hope you can understand my confusion here. Conversations were had with all those involved and there was no doubt on any of our parts as to what the intentions were. These conversations were had a good faith and the requests made of both the Alva's [sic] and myself were handled in a timely fashion. [¶] It is for these reasons that we believe that the assignment of the lease was accepted and the renewal option was handled in the manner prescribed and that the lease is still in effect."

The following day, November 1, 2010, Koslov wrote to Dennis, explaining that some of Dennis's confusion "may result from a failure to differentiate between an assignment of the lease, and an assignment of the option. You talk a lot about the viability of the assignment of the lease. We have not challenged the viability of the assignment of the lease. The lease was assignable. The option, however, was not." Koslov further explained that before the option to renew for five more years could be exercised, two conditions had to be met. First, only the name lessee, i.e., DLD, could exercise the option while in actual physical possession of the property. Second, the option had to have been exercised by DLD at a time before it had the intent to sublease or assign the lease. In addition, DLD had to have given notice to the landlord of the intent to exercise the option. That the landlord allowed DLD to give late notification when it exercised its first option did not constitute a waiver of the timely notification requirement. Koslov explained that any "confusion was not caused by any act of the Owners or their agents. The lease language is quite clear. You did not extend the lease by exercising the option, and it seems unlikely that you ever could have, since you formed the intent to sublease or assign more than 6 months before the end of the prior option period. The formation of that intent, standing along, vitiated the option." With regard to notice of termination of the lease, Koslov explained that "the lease was for a specific period, and, like any lease, terminated automatically at the end of the period without notice." In addition, "the Owners had no reason to think that you and Anne would want your personal guarantees of the lease to extend an extra 5 years without at least some mention of that fact." In summation, Koslov stated, "the option vanished when you formed the intent to sublet or assign. That happened more than 6 months before the end of the prior option period. No notice of intent to exercise the option was theretofore received, or ever."

K. ***Dennis and Alva Question Martin's Bill***

On November 8, 2006, Dennis and Alva sent Martin an email in which they asked him to "break down the hours worked on each section in greater detail." The men

continued, "To be honest we were both surprised at the total cost. We felt that we had done a large portion of the legwork and provided you an agreement in written form that would require very little additional work."

On November 13, 2006, Martin faxed Dennis and Alva a revised billing statement. In an accompanying letter, Martin assured the men that the services he provided "required more than a little additional work." In December, Dennis sent Martin a check for one-half the outstanding balance, explaining that Alva was responsible for the rest.

L. *Landlord Evicts the Alvas*

Burton wanted "approximately $12,000 per month more" than Alva then was paying to stay in the Pasadena location. After about six months, Alva was forced to move the business.

On January 27, 2007, Leisure, on behalf of the landlord, served the Alvas with a 30-day notice to vacate. The Alvas vacated the premises in April 2007 and relocated the business to a smaller, more expensive and less desirable location in South Pasadena at considerable expense, losing the goodwill they had purchased in the Old Town location.

PROCEDURAL BACKGROUND

On February 21, 2007, the Alvas commenced this action against Martin. The Alvas filed a first amended complaint on March 1, 2007 and a second amended complaint on October 26, 2007.

The operative complaint contained three causes of action. In the first cause of action for breach of contract, the Alvas alleged that defendant failed "to render services to Alva in a careful and prudent manner within the standard of care of attorneys performing services for clients similarly situated to Alva." According to the Alvas, Martin breached the contract by failing to request and review a copy of the underlying lease and to advise Alva that the option to extend the term of lease was personal to the original tenant, DLD, and could not be assigned to him absent the landlord's consent. As

a result of Martin's breach, the Alvas, among other things, completed the purchase of the business, paid a consulting fee to DLD, paid for improvements, and paid to relocate the business after being evicted.

In the second cause of action, the Alvas alleged that Martin "failed to exercise reasonable care and skill to protect Alva's rights and in rendering legal services to Alva" resulting in damages in excess of $350,000. In addition, the "Lease did not carry with it an assignment of the option to renew at the rates specified in the Lease." If Alva had known that the option was personal to the original tenant and would not be assigned, he never would have purchased the business and expended additional amounts for advertisement, improvements and insurance.

In their third and final cause of action, the Alvas sought damages resulting from defendant's dual representation of adverse interests. While acknowledging that Martin required them, as well as the Dennises, to sign a conflict of interest waiver, the Alvas alleged that Martin "failed to disclose the areas of potential conflict between the legal interests of Dennis and [DLD] as seller and the interests of Alva as buyer and the reasonably foreseeable adverse consequences to Alva in having Martin represent both Alva and Dennis; and further failed to advise Alva of the possibility and desirability of seeking independent legal advice with respect to said waiver."

On April 18, 2008, Martin filed a motion for summary judgment or, alternatively, summary adjudication of issues. Martin claimed an entitlement to judgment as a matter of law on the Alvas' second amended complaint, in that Martin did not breach the duty of care owed to the Alvas, did not cause the Alvas' alleged damages and the parties were not adverse. Martin argued that he was not retained to advise the Alvas and Dennises generally about their transaction but rather was retained for the specific purpose of reviewing only the documents provided to him and to advise the clients regarding those particular documents. The lease was not among the documents.

The trial court held a hearing on Martin's motion for summary judgment on July 2, 2008. After listening to the arguments of counsel, the trial court took the matter under submission.

On July 7, 2008, the trial court granted Martin's motion for summary judgment. In its minute order, the court explained the reasoning for its ruling as follows: "There is no triable issue of material fact. Under the express terms of the subject engagement letter, attorney Douglas Martin agreed to review documents provided by the Dennises and the Alvas in reference to the purchase and sale of Bellini, Pasadena. Mr. Martin also agreed to give advice to all parties in connection with the documents provided. [Fact no. 11.] It is undisputed that Alva and Dennis failed to provide a copy of the lease or the letter from attorney Koslov for Mr. Martin's review. [Fact nos. 14, 15, 17, 20.] As the lease was not provided for his review, Martin's failure to review the lease and to advise regarding the same did not amount to a breach of duty, as a matter of law.

"The Court further finds that the dual representation by Martin did not create a conflict in that the Dennises and the Alvas did not have adverse interests in the limited representation that they hired Martin to undertake. Mr. Martin was not representing them as buyers and sellers." The court ordered Martin to prepare an order and a judgment.

On August 6, 2008, the trial court signed an order granting Martin's motion for summary judgment. The court's reasons for granting the motion were repeated therein.

On September 12, 2008, judgment in favor of Martin and against the Alvas was entered. In October, the court awarded Martin $5,634.12 in costs.

CONTENTIONS

The Alvas contend the trial court erred in granting Martin's motion for summary judgment for the following reasons:

Martin's engagement letter was ambiguous, and triable issues of fact exist both as to whether Martin attempted to limit the scope of his representation and whether there was a meeting of the minds as to that limited representation.

Any attempt by Martin to limit the scope of his representation was ineffective, in that he violated his ethical duties of disclosure and therefore failed to obtain the Alvas' informed consent to such limited representation.

If Martin did seek to limit the scope of his representation, he nevertheless retained a duty to advise the Alvas that his nonparticipation as to lease issues could operate to their detriment.

Martin caused the Alvas damage by failing to perform his ethical duties of disclosure regarding the representation of potentially adverse interest.

DISCUSSION

A. *Appeal from the Summary Judgment*

1. Standard of Review

Code of Civil Procedure section 437c requires the trial court to grant a motion for summary judgment if the papers submitted on the motion show that "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id*., subd. (c).) We review the propriety of a summary judgment de novo. (*Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1371.)

2. A Triable Issue of Material Fact Exists as to the Scope of Martin's Representation Thus Precluding Summary Judgment

The starting point for resolution of this appeal is Martin's engagement agreement with the Alvas and the Dennises. "When considering a question of contractual interpretation, we apply the following rules. 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' (Civ. Code, § 1636.) 'The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.' (Civ. Code, § 1638.) 'When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . . (Civ. Code, § 1639.)" (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709.)

The threshold inquiry in contract interpretation is whether the contract is ambiguous. (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555.) An ambiguity

exists when a contractual provision is capable of more than one reasonable interpretation. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 73.) If an ambiguity exists, parol evidence is admissible to aid in the interpretation of the contract. (*Appleton v. Waessil*, *supra*, 27 Cal.App.4th at p. 554.) A two-step process is employed in deciding whether parol evidence is admissible. First, "the proffered material regarding the parties' intent" is reviewed to determine "if the language is 'reasonably susceptible' of the interpretation urged by a party. [Citation.] If that question is decided in the affirmative, the extrinsic evidence is then admitted to aid in the second step, which involves actually interpreting the contract. [Citation.]" (*Ibid*.) "Further, parol evidence is admissible only to prove a meaning to which the language is 'reasonably susceptible' [citation], not to flatly contradict the express terms of the agreement. [Citation.]" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167.) "[P]arol evidence of *unspoken subjective intent* is irrelevant to contract interpretation." (*Great American Ins. Co. v. Superior Court* (2009) 178 Cal.App.4th 221, 239, fn. 22; accord, *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.* (1992) 8 Cal.App.4th 338, 346.)

"The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. [Citation.] Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' [Citation.]" (*WYDA Associates v. Merner*, *supra*, 42 Cal.App.4th at p. 1710.)

Paragraph a. of the engagement letter imposed upon Martin a duty to "[r]eview . . . documents provided by the Dennises and the Alvas in reference to the purchase and sale of Bellini, Pasadena." Paragraph b. required Martin to give the parties "[a]dvice to all parties in connection therewith." The Alvas contend that the engagement

agreement is ambiguous as it relates to the scope of Martin's duties.[4] In their view, "[t]here exists a very valid question of whether the term 'advice to all parties in connection therewith' as used in the contract modifies the phrase 'review of documents' or instead modified the phrase 'purchase and sale of Bellini, Pasadena.'"

More specifically, the Alvas read the contract to mean that Martin was required to review documents pertaining to the purchase and sale of the franchise and to advise the parties with regard to the purchase and sale. Martin, on the other hand, asserts that he was only obligated to review documents provided by the parties and give advice about those documents. In our view, both interpretations are reasonable. We therefore conclude that the engagement letter is ambiguous on its face. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.*, *supra*, 175 Cal.App.4th at p. 73.) The trial court's erroneous finding to the contrary, requires reversal of the summary judgment, in that the evidence contained in the parties' moving papers, which is relevant to resolving the ambiguity, is conflicting. (*WYDA Associates v. Merner*, *supra*, 42 Cal.App.4th at p. 1710.)

In support of their interpretation of the engagement agreement, the Alvas rely on Martin's January 31, 2006 transmittal letter, which accompanied his engagement agreement and the conflict waiver. Therein, he explained that "*in order for me to advise all of you in the purchase and sale of Bellini, Pasadena*, it is necessary for me to first obtain a Waiver of Conflict Agreement signed by all of you," as well as a signed engagement letter. (Italics added.) Certainly, the italicized part of Martin's transmittal supports the interpretation urged by the Alvas. The conflict waiver also seemingly supports the Alvas' interpretation to the extent it asked the Alvas and the Dennises to "waive any conflict of interest that might otherwise exist now or in the future, due to

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[4] We reject Martin's argument that the Alvas waived their challenge that the engagement agreement is ambiguous as a result of their failure to raise the issue below. The construction of a contract necessarily starts with a determination of whether the contract is ambiguous. (*Appleton v. Waessil*, *supra*, 27 Cal.App.4th at pp. 554-555.)

[Martin's] representation of [them] on the sale by the Dennises to the Alvas of the assets of the store referred to as 'Bellini Pasadena.'"

The parties' conduct subsequent to the execution of the engagement letter also sheds some light on the parties' interpretation of the engagement agreement. "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754.) Both parties rely on this principle to support their respective positions.

The Alvas claim that Martin's "conduct is not consistent with the limited representation to which he claims to have agreed." Specifically, the Alvas rely on Martin's advice regarding the California Bulk Sales Law and his revision of the sales agreement to reflect that the seller was DLD rather than the Dennises. The Alvas maintain that in both instances "Martin gave advice regarding the overall transaction, elevating himself from the scrivener-type role to which he now seems to want to confine himself." Clearly, Martin's performance of legal services beyond reviewing documents tends to support the Alvas' interpretation of the engagement agreement.

On the other hand, as Martin contends, Alva's post-retention conduct suggests that he understood the limited nature of Martin's representation. After retaining Martin, Alva negotiated directly with the landlord regarding the lease. Alva did not seek Martin's advice or representation during these negotiations, and he did not discuss the negotiations with Martin. In addition, Alva did not provide Martin with copies of the communications he received from the various players involved.

During his negotiations and discussions with the landlord or the landlord's representatives, Alva did not advise anyone that he was represented by counsel. In fact, when asked if he had an attorney, Alva told the landlord's agent he did not. Moreover, Alva paid one-half the $200,000 contract price and commenced operating the Bellini

franchise in early February 2006 before Martin even completed the review of the documents with which he was provided. Alva did so without consulting Martin.

When Alva received Martin's final billing statement, Alva and Dennis emailed Martin to let him know that they "were both surprised at the total cost. We felt that we had done a large portion of the legwork and provided you an agreement already in written form that would require very little additional work." Thus, the Dennises and the Alvas objected to a $2,285.78 bill only later to claim that Martin should have done more.

Also telling is that when Alva received notice in August 2006 that the option had not been assigned, he did not contact Martin. It was only after he was evicted from the property in January 2007 that he contacted Martin. Finally, although Martin twice asked for a copy of the executed sales agreement, neither Alva nor Dennis complied.

Inasmuch as the engagement agreement is ambiguous on its face, and the parol evidence and the parties' post-retention conduct relevant to the interpretation of the agreement is conflicting, we conclude that a question of fact exists precluding a grant of summary judgment. (*WYDA Associates v. Merner*, *supra*, 42 Cal.App.4th at p. 1710; *Loree v. Robert F. Driver Co.* (1978) 87 Cal.App.3d 1032, 1039.) Because there exists a triable issue of material fact as to the scope of Martin's representation, Martin failed to demonstrate that he was entitled to judgment as a matter of law on the Alvas' first and second causes of action for breach of contract and professional negligence.[5]

A similar conclusion is compelled with regard to the Alvas' third cause of action in which the Alvas sought damages resulting from Martin's dual representation of adverse interests. The trial court determined "that the dual representation by Martin did not create a conflict in that the Dennises and the Alvas did not have adverse interests in the limited representation that they hired Martin to undertake. Mr. Martin was not

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[5] In light of our conclusion, we need not reach the merits of the Alvas' contentions that any attempt by Martin to limit the scope of his representation was ineffective and that, notwithstanding the terms of the engagement agreement, Martin had a duty to request a copy of the lease and to advise them and the Dennises regarding it.

representing them as buyers and sellers." Inasmuch as there is a triable issue of material fact as to the scope of Martin's representation, it follows necessarily that there is also a triable issue of material fact as to whether Martin represented the Alvas and the Dennises in their respective capacities as buyers and sellers and whether Martin caused the Alvas damage by failing to perform his ethical duties of disclosure regarding the representation of potentially adverse interests, in contravention of Rules of Professional Conduct, rule 3-310.[6] The trial court therefore erroneously determined that Martin was entitled to judgment as a matter of law on this cause of action as well.

In summary, for the reasons set forth above, we conclude that the trial court erroneously granted Martin's motion for summary judgment as to the operative complaint. The papers submitted on the motion show that there are material factual issues to be determined by the trier of fact and that Martin is not entitled to judgment as a matter of law. (Code of Civ. Proc., § 437c, subd. (c); *Mammoth Mountain Ski Area v. Graham*, *supra*, 135 Cal.App.4th 1367, 1371.)

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6 Subdivision (C) of this rule in pertinent part provides: "A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict."

Rule 3-310(A)(2) defines "informed written consent" as the client's "written agreement to the representation following written disclosure." Subdivision (A)(1) defines the term "disclosure" as "informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client."

Thus, an attorney who jointly represents a buyer and a seller cannot do so without a full disclosure of the facts and circumstances necessary to make a fully informed decision. (See *Klemm v. Superior* Court (1977) 75 Cal.App.3d 893 [joint representation of husband and wife in a non-contested dissolution proceeding]; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136 [joint representation of an insured and insurer in the same litigation]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [attorney representing a spouse in a divorce proceeding cannot limit representation without full disclosure].)

B. ***Appeal from the Order Awarding Costs***

Reversal of the summary judgment necessitates the reversal of the post-judgment order awarding Martin costs.

DISPOSITION

The judgment and order are reversed. Plaintiffs are to recover their costs of appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.